

**FILED**

MAY 17 2006

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA

**BEFORE A HEARING OFFICER BY *[Signature]*  
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )

No. 04-1881

MARY VALENTINE SCHAFFER, )  
Bar No. 017474 )

RESPONDENT. )

**HEARING OFFICER'S REPORT**

**PROCEDURAL HISTORY**

A probable cause order was issued on September 7, 2005. The State Bar filed a Complaint on December 27, 2005. Respondent filed an Answer on January 18, 2006. Settlement was reached at a settlement conference held on March 1, 2006. Upon uncontested motion by the State Bar, a Protective Order was issued on March 14, 2006, and on March 20, 2006, the State Bar filed its First Amended Complaint. On April 7, 2006, the State Bar and Respondent filed the Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum in Support of Agreement for Discipline by Consent. A telephonic clarification conference was held on April 17, 2006, after which, on May 1, 2006, the State Bar and Respondent submitted a Revised Tender of Admissions and Agreement for Discipline by Consent ("Revised Tender") and Revised Joint Memorandum in Support of Agreement for Discipline by Consent ("Revised Joint Memo"). No hearing has been held in this matter.

**SUMMARY**

The Complaint in this matter consists of a single count alleging that Respondent engaged in three different types of misconduct: (1) failing to notify clients and continuing to

1 practice law while suspended for non-compliance with MCLE requirements; (2) failing to  
2 respond to the State Bar's demands for specific information relating to her non-compliance  
3 with MCLE requirements and practice of law while suspended; and (3) moving to continue a  
4 hearing after being directed by her client to proceed with the hearing. State Bar Counsel and  
5 Respondent have jointly submitted a statement of facts, conditional admissions by  
6 Respondent and conditional dismissed allegations by the State Bar, and have agreed that  
7 restitution is not an issue in this matter.

8 The Hearing Officer accepts the facts, conditional admissions, and conditional  
9 dismissed allegations that have been submitted by Respondent and the State Bar and  
10 recommends that the Disciplinary Commission order the sanctions proposed by the parties.

11 For reasons discussed below, the analysis of the Hearing Officer differs from that of  
12 the parties with respect to the applicability of a factor in aggravation and a factor in  
13 mitigation. These differences, however, do not affect the consent agreement for discipline  
14 presented by the parties, because aggravation and mitigation factors are referenced only in the  
15 Revised Joint Memo; they are not mentioned or incorporated into the Revised Tender of  
16 Admissions and Agreement for Discipline by Consent. Consequently, neither a modification,  
17 pursuant to Rule 56(b), Ariz. R. S. Ct., of the Revised Tender of Admissions and Agreement  
18 for Discipline by Consent, nor any change to the sanctions proposed by the parties, is  
19 recommended or ordered.  
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## 22 FINDINGS OF FACT

23 1. At all times relevant hereto, Respondent was a member of the State Bar of  
24 Arizona, having been admitted on October 19, 1996.  
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2. Respondent was placed on administrative suspension on March 1, 2004 for failure to comply with the Mandatory Continuing Legal Education (MCLE) requirement for the educational year 2002/2003.

3. Respondent was contacted by the State Bar concerning her failure to submit an Affidavit of Compliance with Rule 45, Ariz. R. S. Ct., for the 2002/2003 educational year by letters dated November 13, 2003 and January 16, 2004. The January 16, 2004 letter was sent by certified mail and the return receipt was signed by Respondent on January 24, 2004.

4. By letter dated March 1, 2004, Respondent was notified that she was summarily suspended.

5. Respondent was reinstated to active membership on October 25, 2004.

6. Respondent was previously placed on administrative suspension from March 12, 2001 to September 25, 2002 for failure to comply with the MCLE requirements. During that prior suspension, Respondent continued to practice law. However, because of miscommunications between Respondent and the State Bar after Respondent attempted to resolve the matter with the State Bar, Respondent did not know she was still suspended. No disciplinary sanctions resulted from her conduct during this prior summary suspension.

#### COUNT ONE

7. During the time that she was suspended for failure to comply with MCLE requirements for the 2002/2003 educational year, from March 1, 2004 through October 25, 2004, Respondent knowingly continued to practice law.

8. Respondent represented a client ("Client")<sup>1</sup> in Pima County Superior Court case number J#163107. A hearing was set in Client's case for October 21, 2004. On or about

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<sup>1</sup> To protect client privacy, the facts and conditional dismissed allegations submitted by the parties have been modified to substitute the word, "Client" for an individual's name, as the name is not required for disposition of this matter.

1 October 20, 2004, Respondent called Client and informed her that she intended to file a  
2 motion to continue the hearing to another date. Client informed Respondent that she did not  
3 want her hearing continued, but Respondent brought the motion to continue before the Court  
4 anyway. The motion was heard on October 21, 2004 and the Court continued the hearing to  
5 another date.

6 9. On or about October 20, 2004, Client contacted the State Bar by telephone and was  
7 told that Respondent's license was suspended and she was unable to practice law.

8 10. Client filed charges with the State Bar on or about November 1, 2004.

9 11. By letter dated December 23, 2004, the State Bar notified Respondent of the  
10 charges against her. The letter requested that Respondent file a written response to the charges  
11 within twenty (20) days of the date of the letter.

12 12. In a letter dated January 22, 2005 responding to the charges, Respondent advised:

13 a. Respondent needed to continue the hearing date because she had an  
14 important doctor's appointment for one of her children scheduled at the time of  
15 Client's review hearing.

16 b. Client was extremely upset that Respondent wished to continue the hearing  
17 and appeared at the court to oppose her motion.

18 c. On October 21, 2004, the Assistant Attorney General also requested a  
19 continuance of the hearing and Client then agreed to the continuance.

20 d. Respondent subsequently withdrew from Client's case and the Court  
21 appointed another attorney to represent Client.

22 13. Although the inquiry from Bar Counsel requested she address the allegation that  
23 she had practiced law while suspended, in her January 22, 2005 response to the charges,  
24 Respondent failed to respond to that allegation.  
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14. Accordingly, by letter dated April 15, 2005, the State Bar requested that Respondent address the issue of whether she knowingly practiced law while on suspension and also asked Respondent what cases and legal matters she was involved with during the time of her suspension. The letter requested that Respondent respond to the letter within ten (10) days.

15. By letter dated May 10, 2005, Respondent responded to the State Bar's inquiries, providing the following information:

- a. Respondent failed to timely return her MCLE certificate in 2004.
- b. Respondent received letters from the State Bar but did not open them, leaving them in the bottom of her briefcase.
- c. Respondent continued to accumulate MCLE hours and had sufficient hours to meet the State Bar's MCLE requirements; however, she did not respond to the State Bar's letters and continued to put the unopened envelopes in her briefcase.
- d. Finally, Respondent contacted the MCLE office in or about June or July 2004 and confirmed that she had been suspended effective March 1, 2004.
- e. Respondent contacted an attorney and was ultimately reinstated on October 25, 2005.
- f. Respondent, along with her son's father, cares for her adult son who suffers from mental retardation, autism and severe mental illness. Her son became increasingly violent and difficult to handle in 2004. He was hospitalized in September 2004 for a week and a half, and after he was released, her son suffered severe reactions to medication and was again hospitalized.
- g. In October 2004, her 15-year-old daughter was involved in an automobile accident and was hospitalized with head trauma.

1                   h. Respondent moved to continue the hearing because it conflicted with an  
2                   important doctor's appointment for one of her children.

3                   i. Respondent admitted she continued to practice law even though she knew  
4                   this was wrong.

5                   16. In her response of May 10, 2005, Respondent did not respond to bar counsel's  
6                   inquiry and failed to disclose the cases and legal matters that she had worked on during her  
7                   suspension.

8                   17. By letter dated May 12, 2005, the State Bar again asked Respondent what cases  
9                   and legal matters she was involved with during the time of her suspension. The letter  
10                  requested that Respondent respond to the letter within ten (10) days. Respondent failed to  
11                  respond.

12                  18. By letter dated July 29, 2005, the State Bar requested that Respondent answer  
13                  specific questions concerning all cases and legal matters she was involved with during the  
14                  time of her suspension, including those discovered by the State Bar's investigation. The letter  
15                  requested that Respondent respond to the letter within twenty (20) days. The letter stated that  
16                  the State Bar would add a violation of Rule 53 if Respondent failed to respond to the letter.  
17                  Respondent failed to respond.

18                  19. On September 7, 2005, the Probable Cause Panelist of the State Bar issued a  
19                  probable cause order.

20                  20. Andrew Dowdle, Supervisor for the Attorney Scheduling Department of the Pima  
21                  County Superior Court, provided information indicating Respondent provided legal services  
22                  and appeared as attorney of record in at least four cases in addition to Client's case during the  
23                  time that she was suspended. These cases included the following:  
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1 a. Court pleadings filed from March 1 to October 25, 2004 indicate that  
2 Respondent represented one of the fathers in Pima County Superior Court case  
3 number 16407900 and made numerous appearances in court on his behalf during the  
4 time that she was suspended.

5 b. Court pleadings filed from March 1 to October 25, 2004 indicate that  
6 Respondent represented the minors in Pima County Superior Court case number  
7 16355000 and made numerous appearances in court on their behalf during the time  
8 that she was suspended.

9 c. Court pleadings filed from March 1 to April, 2004 indicate that Respondent  
10 represented the father in Pima County Superior Court case number 16221700 and  
11 made numerous appearances in court on his behalf during the time that she was  
12 suspended.

13 d. Court pleadings filed from March 1 to June, 2004 indicate that Respondent  
14 represented the father in Pima County Superior Court case number 16425600 and  
15 made numerous appearances in court on his behalf during the time that she was  
16 suspended.

#### 17 **CONDITIONAL ADMISSIONS**

18 Respondent conditionally admits that as set forth above, her conduct in practicing law  
19 while suspended violated Rule 31(b), Ariz. R. S. Ct., Rule 42, Ariz. R. S. Ct., ER 5.5, and  
20 Rule 53(c), Ariz. R. S. Ct.; her failing to inform her clients of her suspension and that she  
21 could not continue as their lawyer violated Rule 42, Ariz. R. S. Ct., ER 1.4; her repeatedly  
22 failing to respond to specific demands for information relating to a discipline matter from Bar  
23 Counsel violated Rule 42, Ariz. R. S. Ct., ER 8.1(b), Rule 53(d) and (f), Ariz. R. S. Ct.; and in  
24 all the foregoing respects, her conduct violated Rule 42, Ariz. R. S. Ct., ER 8.4(d).  
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Respondent's admissions are being tendered in exchange for the form of discipline stated below.

### CONDITIONAL DISMISSED ALLEGATIONS

The State Bar conditionally agrees to dismiss the following charges alleged in the Complaint:

A. The State Bar agrees to dismiss the charge Respondent violated Rule 42, Ariz.R. S. Ct., ER 1.2 for the reason that the State Bar admits for purposes of the Agreement that Respondent's motion to continue Client's review hearing was not a material failure to abide by a client's decisions concerning the objectives of the representation.

B. The State Bar agrees to dismiss the charge Respondent violated Rule 42 Ariz. R. S. Ct., ER 1.3 for the reason that the State Bar admits for purposes of the agreement that, while Respondent violated other rules, it could not be proven by clear and convincing evidence that Respondent failed to exercise diligence in the actual representation of her clients.

C. The State Bar agrees to dismiss the charge Respondent violated Rule 42, Ariz. R. S. Ct., ER 8.4(c) for the reason that the State Bar admits for purposes of the agreement that it could not be proven by clear and convincing evidence that Respondent knowingly misrepresented facts to the State Bar during the investigation.

### ABA STANDARDS

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state and (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

The State Bar and Respondent have agreed that the most applicable standards are *Standard* 6.0, Violations of Duties Owed to the Legal System and *Standard* 7.0, Violations of



1 Duties Owed to the Profession, both of which were considered by the hearing officer in  
2 determining the appropriate sanction warranted by Respondent's conduct.

3 *Standard 6.0* includes violations of Rule 42, Ariz. R. S. Ct., ER 8.4(d), involving  
4 conduct prejudicial to the administration of justice, including Respondent's practicing law  
5 while suspended, failing to inform her clients that she was suspended and could not represent  
6 them while suspended, and failing to respond to specific demands from State Bar counsel for  
7 information relating to a disciplinary matter. *Standard 6.12* provides:

8 Suspension is generally appropriate when a lawyer knows that false statements  
9 or documents are being submitted to the court or that material information is  
10 improperly being withheld, and takes no remedial action, and causes injury or  
11 potential injury to a party to the legal proceeding, or causes an adverse or  
12 potentially adverse defect on the legal proceeding.

13 *Standard 7.0*, Violations of Duties Owed to the Profession, extends to violations of  
14 Rule 42, Ariz. R. S. Ct., specifically ER 5.5(a) and ER 8.1(b) and Rule 31(b), Ariz. R. S. Ct.,  
15 including Respondent's practice of law while suspended and her lack of response to the  
16 lawful inquiries of the State Bar. *Standard 7.2* provides:

17 Suspension is generally appropriate when a lawyer knowingly engages in  
18 conduct that is a violation of a duty owed as a professional, and causes injury or  
19 potential injury to a client, the public, or the legal system.

20 Respondent has admitted that she knowingly continued to practice law after receiving  
21 notice of her summary suspension, that she did not respond to the lawful demands from the  
22 State Bar requesting information and that her conduct, taken as a whole, violated her duties to  
23 her clients, to the profession and to the legal system. While there was a potential risk that  
24 Respondent's participation in legal proceedings while suspended could have resulted in  
25 discontinuity in legal representation and delay, causing harm to clients, as well as to the legal  
26 system and the profession, no actual harm has been identified, and no client or other person or  
entity is entitled to restitution as a result of the conduct under consideration.

1 Based on the facts and conditional admissions contained in the Revised Tender and  
2 information contained in the Revised Joint Memo, the presumptive sanction for the admitted  
3 conduct under the *Standards* is suspension.

4 This Hearing Officer then considered aggravating and mitigating factors in this case,  
5 pursuant to *Standards* 9.22 and 9.32, respectively.

6 The parties identified four (4) factors present in aggravation:

7 9.22 (c) a pattern of misconduct;

8 9.22 (d) multiple offenses;

9 9.22 (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to  
10 comply with rules or orders of the disciplinary agency; and

11 9.22 (i) substantial experience in the practice of law;

12 and one (1) factor present in mitigation:

13 9.32 (a) absence of a prior disciplinary record.

14 The hearing officer finds only the first three (3) factors present in aggravation, but  
15 does not find *Standard* 9.22 (i) substantial experience in the practice of law as present in  
16 aggravation or *Standard* 9.32 (a) absence of a disciplinary record as present in mitigation.  
17 There are no other factors present in aggravation or mitigation.  
18

19 With respect to the applicability of *Standard* 9.22 (i) substantial experience in the  
20 practice of law, Respondent had been admitted to the bar for approximately 7 ½ years, when  
21 she was summarily suspended on March 1, 2004. There is no indication whether she practiced  
22 full-time during this entire period; however, she was under summary suspension for 18  
23 months, from March 12, 2001 to September 25, 2002. *See Facts, supra*, ¶16. While  
24 Respondent is not a new lawyer, the length of her prior active practice is not deemed  
25 sufficient to constitute a factor in aggravation.  
26

1 The parties identified Respondent's absence of a prior disciplinary record as a factor  
2 in mitigation pursuant to *Standard* 9.32 (a). The absence of a disciplinary record, particularly  
3 over an extended period of active legal practice, suggests that a lawyer's past conduct  
4 consistently accorded with applicable rules and standards of practice. As noted above,  
5 Respondent has practiced law for, at most, 7 ½ years. Moreover, while "not officially charged  
6 with violations," she has acknowledged practicing law during a prior summary suspension  
7 and has agreed that her prior conduct may be considered, pursuant to *Standard* 9.22(c) pattern  
8 of misconduct, as a factor in aggravation. In these circumstances, the absence of a disciplinary  
9 record does not permit an inference about Respondent's past conduct for consideration as a  
10 factor in mitigation.

#### 11 PROPORTIONALITY REVIEW

12 The Supreme Court has held that in order to achieve proportionality when imposing  
13 discipline, the discipline in each situation must be tailored to the individual facts of the case in  
14 order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983)  
15 and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

17 In this case, the most serious instance of misconduct involves Respondent's continued  
18 practice of law in Arizona while summarily suspended. In recent years there have been  
19 several cases which are instructive.

20 Although suspensions of more than six months and a day have been imposed on  
21 attorneys who, like Respondent, continued to represent clients while summarily suspended for  
22 non-compliance with MCLE requirements, the circumstances in those cases warranted more  
23 severe sanctions. See *In re Allred*, SB-98-0049-D (1998) (misrepresentation of status to a  
24 judge nearly a year after summary suspension); and *In re Larriva*, SB-96-0020-D (1997)

1 (failure to answer the complaint, having been informally reprimanded four years earlier for  
2 failing to cooperate in a State Bar investigation).

3 On the other hand, the sanction for knowingly continuing to practice law during a  
4 suspension may be reduced to a censure when justified by factors present in mitigation. *See*,  
5 *e.g.*, *In re Rodgers*, SB-04-0136-D (2004) (9.32 (a) absence of a prior disciplinary record, (e)  
6 cooperative attitude, (g) character or reputation and (l) remorse) and *In re Gwilliam*, SM-03-  
7 0004-D (2003) (9.32 (b) absence of a dishonest/selfish motive, (c) personal/emotional  
8 problems, (d) timely good faith efforts to rectify consequences of misconduct, (e) cooperative  
9 attitude and (l) remorse).

10 Respondent's conduct and circumstances fall between these extremes, and  
11 Respondent and the State Bar have agreed that a suspension for 120 days is appropriate. This  
12 proposed duration is within the range of those imposed on lawyers who knowingly practiced  
13 law while suspended, absent unusual factors present in aggravation or mitigation. *See In re*  
14 *Rhees*, SB-01-0161-D (2001) (4 month suspension); *In re Prince*, SB-99-0091-D (2000) (six  
15 month suspension); and *In re Kalish*, SB-96-0013-D (1996) (4 month suspension).

16 A recent disciplinary proceeding, *In re Lynch*, SB-06-0042-D (2006),<sup>2</sup> addresses  
17 conduct that is factually similar to that of Respondent. Lynch, like Respondent, continued to  
18 practice law in multiple cases while summarily suspended for non-compliance with MCLE  
19 requirements. Finding two factors present in aggravation, *Standard* 9.22 (d) multiple offenses  
20 and (i) substantial experience in the practice of law (13 years), and three factors present in  
21 mitigation, *Standard* 9.32 (a) absence of a prior disciplinary record, (d) full and free  
22 disclosure to disciplinary board or cooperative attitude toward proceedings and (l) remorse,  
23 the hearing officer and Disciplinary Commission recommended the sanction proposed by the  
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<sup>2</sup> As of the date of this report, the Supreme Court has not issued a final judgment and order on this matter.

1 parties in a consent agreement, a 90 day suspension. The 120 day suspension agreed to by  
2 Respondent and the State Bar is consistent with *In re Lynch* and the other cited cases  
3 involving similar conduct.

### 4 RECOMMENDATION

5 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public  
6 and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320  
7 (1993). It is also the objective of lawyer discipline to protect the public, the profession and  
8 the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another  
9 purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20,  
10 29, 881 P.2d 352, 361 (1994).

11 In imposing discipline, it is appropriate to consider the facts of the case, the *American*  
12 *Bar Association's Standards for Imposing Lawyer Sanctions* ("Standards") and the  
13 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283,  
14 286, 872 P.2d 1235, 1238 (1994).

15 Upon consideration of the facts, application of the *Standards*, including aggravation  
16 and mitigation factors, and a proportionality analysis, this Hearing Officer recommends the  
17 sanctions proposed in the Revised Tender of Admissions and Agreement for Discipline by  
18 Consent, as follow:  
19

20 1. Respondent will receive a suspension of 120 days and be placed on probation for  
21 two years, to run concurrently with the suspension, for violating Rule 31(b), Ariz. R. S. Ct.;  
22 Rule 42, Ariz. R. S. Ct., specifically, ER 1.4, ER 5.5, ER 8.1(b), ER 8.4 (d); and Rule 53(c),  
23 (d) and (f), Ariz. R. S. Ct.  
24

25 2. The suspension will commence on the date of the final judgment and order entered  
26 in this matter.

1 a. The term of probation shall be for two years, to commence on the date of  
2 the final judgment and order entered in this matter and to run concurrently with the  
3 term of suspension.

4 b. Respondent shall contact the Director of the Member Assistance Program  
5 ("MAP") within 30 days of the final judgment and order and submit to an assessment.  
6 Respondent thereafter will enter into a MAP contract based upon recommendations  
7 made by the MAP director or designee. Respondent shall comply with the  
8 recommended terms. The MAP contract will be incorporated herein by this reference.  
9

10 c. In the event that Respondent fails to comply with the foregoing conditions,  
11 and the State Bar receives information regarding such failure, bar counsel shall file  
12 with the Hearing Officer a Notice of Non-Compliance pursuant to Rule 60(a)5, Ariz.  
13 R. S. Ct. In such event, the Hearing Officer shall conduct a hearing within 30 days  
14 after receipt of said notice to determine whether the terms of probation have been  
15 violated and whether additional sanctions should be imposed. At such hearing, the  
16 burden of proof shall be on the State Bar to prove non-compliance by clear and  
17 convincing evidence.  
18

19 4. Respondent shall pay all costs incurred by the State Bar in connection with these  
20 proceedings, including the assessment by MAP.  
21

22 DATED this 17<sup>th</sup> day of May, 2006.

23  
24 \_\_\_\_\_  
25 Paula N. Wilk  
26 Hearing Officer 8R

1 Original filed with the Disciplinary Clerk  
2 this 17<sup>th</sup> day of May, 2006.

3 Copy of the foregoing mailed  
4 this 17<sup>th</sup> day of May, 2006, to:

5 Mary Valentine Schaffer  
6 Respondent  
7 P.O. Box 30335  
8 Tucson, AZ 85751-0335

9 Denise K. Tomaiko  
10 Bar Counsel  
11 State Bar of Arizona  
12 4201 North 24<sup>th</sup> Street, Suite 200  
13 Phoenix, AZ 85016-6288

14 by: K. Weigand  
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